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# Symposium: Tinker at Forty: Defending the Right of High School Students to Wear Controversial Religious and Pro-Life Clothing

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# Symposium: Tinker at Forty: Defending the Right of High School Students to Wear Controversial Religious and Pro-Life Clothing

## Abstract

This Article argues for broad First Amendment protection for “controversial” religious and pro-life student expression. The vast majority of religious and pro-life clothing is no more likely to create an actual disturbance that substantially disrupts school functions than a peace armband worn during Vietnam, the student expression upheld in the seminal case of *Tinker v. Des Moines Independent Community School District*. Section I of this Article discusses several Supreme Court student speech cases with an emphasis on their applicability to situations involving high school students who wear “controversial” religious and pro-life clothing. This section argues that *Tinker*’s substantial disruption test—not *Tinker*’s “rights of others” dicta or *Bethel School District No. 403 v. Fraser*—provides the appropriate mode of analysis for cases involving “controversial” religious and pro-life clothing. Section II reviews several lower court cases that have considered restrictions on student religious or pro-life speech. This section argues that *Nixon v. Northern Local School District Board of Education*, *K.D. ex rel. Dibble v. Fillmore Central School District*, and *Saxe ex rel. Saxe v. State College Area School District*<sup>12</sup> present a proper reading of *Tinker* by providing broad protection for controversial student speech. Conversely, *Nuxoll ex rel. Nuxoll v. Indian Prairie School District* and *Harper ex rel. Harper v. Poway Unified School District* provide insufficient protection for student religious and pro-life expression. The Article concludes by encouraging lower courts to follow the reasoning of the more speech-protective cases whenever possible.

## Keywords

First Amendment, Religious speech, *Tinker*, Substantial disruption test

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# TINKER AT FORTY: DEFENDING THE RIGHT OF HIGH SCHOOL STUDENTS TO WEAR “CONTROVERSIAL” RELIGIOUS AND PRO-LIFE CLOTHING

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## INTRODUCTION

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.<sup>1</sup>

The interplay between student freedom of speech and school maintenance of authority is a recurring issue in American high schools. The messages that students seek to convey to one another through clothing range from frivolous to serious, from crude to sophisticated, from mundane to controversial.<sup>2</sup> While many students make their clothing choices with an eye on fashion, popularity, or fitting in, others seek to convey a message about religious, political, or moral issues of importance to them. Student expression sometimes touches upon controversial issues such as American involvement in war, support for the president, religion, politics, abortion, marriage, homosexuality, and immigration reform.<sup>3</sup>

Students whose clothing deals with controversial topics may want to spark conversations, change other students' minds, or simply express their opinions to their peers. Often, however, any actual or potential controversy that may arise between students over the content of a controversial shirt, armband, or other clothing is overshadowed by a conflict that develops between the speaker and school officials who punish the student for wearing the expressive item or prohibit him or her from wearing it in the future.<sup>4</sup> At that point, the student's insistence on a right to continue to wear the expressive clothing tests

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1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969) (citation omitted).

2. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269 (1988) (holding that a principal had the authority to prohibit students from publishing an article about teen pregnancy in the school's newspaper).

3. *See, e.g., Tinker*, 393 U.S. at 504 (stating that several students wore black armbands to their school to protest the Vietnam War).

4. *See id.* at 505 (noting that several students were suspended from school for wearing armbands as a form of protest and were not permitted to come back to school until they returned without the armbands).

the limits upon the school's authority to control the educational environment.<sup>5</sup>

As numerous federal court cases make clear, sometimes school districts overstep their bounds and violate students' right to freedom of speech, while other times their actions are legally permissible.<sup>6</sup> While some well-established principles have emerged over the course of decades of litigation, the case-by-case nature of the legal standards involved can make it difficult to predict how courts will apply existing precedent to any particular set of facts. It is clear, however, that some courts have sought to preserve the greatest extent of student freedom of speech possible while others have given educators much greater leeway to restrict controversial student speech.<sup>7</sup>

This Article argues for broad First Amendment protection for "controversial" religious and pro-life student expression. The vast majority of religious and pro-life clothing is no more likely to create an actual disturbance that substantially disrupts school functions than a peace armband worn during Vietnam, the student expression upheld in the seminal case of *Tinker v. Des Moines Independent Community School District*.<sup>8</sup> Section I of this Article discusses several Supreme Court student speech cases with an emphasis on their applicability to situations involving high school students who wear "controversial" religious and pro-life clothing. This section argues that *Tinker's* substantial disruption test—not *Tinker's* "rights of others" dicta or *Bethel School District No. 403 v. Fraser*<sup>9</sup>—provides the appropriate mode of analysis for cases involving "controversial" religious and pro-life clothing.

Section II reviews several lower court cases that have considered restrictions on student religious or pro-life speech. This section

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5. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (explaining that schools teach students how to behave in a mature and civil manner).

6. Compare *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 975 (S.D. Ohio 2005) (holding that a student's First Amendment rights were violated when school administrators told him to leave school for wearing a religious t-shirt), with *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185 (9th Cir. 2006), *vacating as moot*, 549 U.S. 1262 (2007) (holding that school administrators had the authority to suspend a student for wearing a religious t-shirt that condemned homosexuality).

7. See *infra* Part II.A–B (comparing cases where courts have protected the student's right to self-expression to cases where the courts emphasized the need for the school to maintain an orderly learning environment).

8. See *Tinker*, 393 U.S. at 740 (reversing the lower court and permitting students to wear armbands illustrating their disagreement with the Vietnam War because the armbands did not create a substantial disturbance in the classroom).

9. For a discussion of *Bethel*, one of the Supreme Court's student speech cases, see *infra* Section I.C.

argues that *Nixon v. Northern Local School District Board of Education*,<sup>10</sup> *K.D. ex rel. Dibble v. Fillmore Central School District*,<sup>11</sup> and *Saxe v. State College Area School District*<sup>12</sup> present a proper reading of *Tinker* by providing broad protection for controversial student speech. Conversely, *Nuxoll ex rel. Nuxoll v. Indian Prairie School District*<sup>13</sup> and *Harper ex rel. Harper v. Poway Unified School District*<sup>14</sup> provide insufficient protection for student religious and pro-life expression. The Article concludes by encouraging lower courts to follow the reasoning of the more speech-protective cases whenever possible.

It is important to note that, while this article focuses on religious and pro-life student expression that might be considered to be “controversial,” all religious and pro-life speech may be characterized as controversial in some sense. Religious speech often touches upon one’s most fundamental understanding of the universe and human existence, and one’s moral, social, and political worldview. Religious speakers often encourage those who hear or read their messages to reconsider their religious beliefs, reexamine their understanding of right and wrong, or take, or refrain from taking, certain actions.<sup>15</sup>

Similarly, speakers who oppose abortion often express their strong disagreement with abortion in stark terms and urge others to reconsider their beliefs about the morality of abortion. If schools are permitted to use a heavy hand in restricting student expression that, in the school’s view, “attacks” other students’ belief systems (by challenging them to reconsider their views) or speech that may offend some students or make them feel uncomfortable, a vast expanse of student religious and pro-life expression will be subject to censorship.

## I. SUPREME COURT CASES GOVERNING STUDENT SPEECH

The Supreme Court has on several occasions considered the interplay between the authority of public schools to govern student conduct and the right of students to convey (or refuse to convey) a message. This Section reviews five key cases with an emphasis on their relevance for cases involving religious, pro-life, and pro-traditional marriage t-shirts.

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10. 383 F. Supp. 2d at 965.

11. No. 05-CV-0336(E), 2005 WL 2175166 (W.D.N.Y. Sept. 6, 2005).

12. 240 F.3d 200 (3d Cir. 2001).

13. 523 F.3d 668 (7th Cir. 2008).

14. 445 F.3d 1166 (9th Cir. 2006), *vacating as moot*, 549 U.S. 1262 (2007).

15. See, e.g., *K.D.*, 2005 WL 2175166, at \*1–3 (describing the case of a student who wore a shirt to school that criticized abortion and alluded to the value of life).

A. West Virginia State Board of Education v. Barnette

In *West Virginia State Board of Education v. Barnette*,<sup>16</sup> the Court held that a public school could not compel students to recite the Pledge of Allegiance over their religious objections.<sup>17</sup> Although subject to expulsion from school, some students refused to recite the Pledge because doing so would violate their religious beliefs.<sup>18</sup>

While acknowledging that “the State may ‘require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country,’”<sup>19</sup> the Court noted, “[h]ere, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means.”<sup>20</sup> Although the educational functions of school officials are important, the Court declared that there were “none that they may not perform within the limits of the Bill of Rights.”<sup>21</sup>

The Court added:

[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>22</sup>

While *Barnette* has been treated primarily as a “compelled speech” case, it has continued relevance in the context of controversial student speech. *Barnette* stands for the principle that school officials may not trample upon students’ right to freedom of speech in their eagerness to promote an ideal such as patriotism, love of country, or, in the current setting, tolerance of other students’ beliefs and actions.<sup>23</sup>

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16. 319 U.S. 624 (1943).

17. *Id.* at 642. The Court noted that the First Amendment protects dissenters from being coerced by governmental officials. *Id.*

18. *Id.* at 629.

19. *Id.* at 631 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940)).

20. *Id.*

21. *Id.* at 637.

22. *Id.* at 642.

23. *See id.* at 644 (explaining that the toleration of conflicting viewpoints is essentially a benchmark of democracy).

B. *Tinker v. Des Moines Independent Community School District*

*Tinker* stands as the pinnacle of student speech rights.<sup>24</sup> In *Tinker*, a group of junior high school and senior high school students decided to wear black armbands to school to protest the Vietnam War and publicize their support for a truce.<sup>25</sup> When school officials learned of the students' proposed activities, they enacted a policy prohibiting students from wearing armbands during school.<sup>26</sup> Nevertheless, the students wore their black armbands and were suspended.<sup>27</sup>

The Supreme Court declared that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it"<sup>28</sup> and "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."<sup>29</sup> The Court noted that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students,"<sup>30</sup> and declared that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>31</sup>

In particular, public schools may not stifle student speech simply because it expresses a viewpoint that differs from the school's viewpoint on controversial issues:

In our system, state-operated schools may not be enclaves of totalitarianism. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>32</sup>

The Court elaborated on the scope of student speech rights, stating:

A student's rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions,

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24. See Kyle W. Brenton, Note, *BONGHiTSAJESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1211–14 (2008) (discussing how later cases such as *Fraser*, *Hazelwood* and *Morse* limit student speech beyond the broad rule espoused in *Tinker* that greatly protected students' First Amendment rights).

25. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

26. *Id.*

27. *Id.*

28. *Id.* at 505.

29. *Id.* at 505–06.

30. *Id.* at 506.

31. *Id.*

32. *Id.* at 511.



even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others.<sup>33</sup>

The Court held that the school violated the students’ right to freedom of speech by prohibiting them from wearing armbands, stating that there was no evidence “that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>34</sup> Regarding the non-disruptive nature of the students’ expression, the Court noted:

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.<sup>35</sup>

While speech restrictions enacted by public school officials must be based on more than “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,”<sup>36</sup> the school’s actions in this case “appear[] to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation’s part in the conflagration in Vietnam.”<sup>37</sup> The broad scope of the *Tinker* Court’s protection of controversial student “pure speech” cannot be understated.<sup>38</sup>

Justice Black stated in his dissenting opinion that “students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors.”<sup>39</sup> Moreover, Justice Black observed:

[The students’] armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older

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33. *Id.* at 512–13 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

34. *Id.* at 509.

35. *Id.* at 508.

36. *Id.* at 509.

37. *Id.* at 510.

38. *See id.* at 505–06 (noting that “pure speech” is entitled to significant protection under the First Amendment).

39. *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

football player that other, nonprotesting students had better let them alone. . . . [A] teacher of mathematics had his lesson period practically “wrecked” chiefly by disputes with Mary Beth Tinker, who wore her armband for her “demonstration.”<sup>40</sup>

Despite these facts, however, the majority opinion explained that a school cannot censor student expression simply because it may foster debate or trigger arguments among students. The Court observed that, “in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>41</sup>

Since *Tinker* was decided, many commentators have debated whether the decision (and subsequent cases interpreting and applying it) struck the proper balance between the interests of schools and the speech rights of students.<sup>42</sup> Some have argued that the courts have given too little weight to the arguments of school administrators. One author has declared that “[w]ith every decision upholding students’ right to free expression in public schools, the federal courts of this country weaken the structural integrity of the foundation that is our system of public education.”<sup>43</sup> Another commentator has argued that *Tinker*’s material disruption standard should be lessened to allow schools to regulate speech that merely *distracts* other students “for the sake of better promoting the school’s varied basic missions and purposes.”<sup>44</sup>

On the other hand, some have defended *Tinker* and argued for the greatest protection of student expression possible. One author has stated that “[c]ountless rationales are given as to why student’s free

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40. *Id.* at 517–18.

41. *Id.* at 508 (majority opinion).

42. This debate has not been confined solely to *Tinker* but has engulfed its progeny as well. See *infra* notes 123–132 and accompanying text (discussing how *Morse* has further blurred the line between the authority of the school and the constitutional freedoms of its students).

43. Michael C. Jacobson, Note, *Chaos in Public Schools: Federal Courts Yield to Students While Administrators and Teachers Struggle To Control the Increasingly Violent and Disorderly Scholastic Environment*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 909, 909 (2006). This author posits that

[w]here the *potential* exists (for any student who has not reached the age of majority) for the school’s educational mission to be disrupted by political or religious rhetoric, the value of a *pure education*—the ability to formulate one’s own opinion, rather than have the opinion of another student forced upon them—must substantially outweigh the value of unfettered First Amendment rights of students who the Supreme Court has classified as “unemancipated.”

*Id.* at 929 (citation omitted).

44. R. George Wright, *Tinker and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105, 109 (2008); see also *id.* (“Individual public schools should be permitted reasonable experimental latitude in fairly regulating student speech that causes distraction in order to better discharge the school’s overall educational and community responsibilities.”).

speech rights should be limited, but none are persuasive. Rather, school students should be given the opportunity to exercise constitutional rights to better prepare them for adulthood.”<sup>45</sup> Another commentator has declared that *Tinker* is based on the idea that “[a]chieving free expression requires an open marketplace in which citizens are susceptible to varied viewpoints. Moreover, schools are parts of that marketplace, with students entitled to the privileges of citizenry.”<sup>46</sup> In addition,

[o]ne corollary of intolerance and the silencing of dissent is conformity. Individuals who choose to be nonconformist are sometimes viewed as problematic by authorities. Those authorities who suppress disagreement often do so to achieve uniform allegiance to—and acceptance of—their belief systems.<sup>47</sup>

Unpopular or controversial student speech is deserving of broad protection precisely because it is likely to prompt discussion and debate among students. One author has noted that “[p]olitical, religious, literary, intellectual, and artistic expression can contribute to the development of children’s moral powers, so expression in these categories merits special protection.”<sup>48</sup> While expression in these categories may cause some students to reconsider their own beliefs and behaviors, that is no reason to censor student speech. The Supreme Court’s more recent student speech cases have served to fuel, rather than end, debate over *Tinker*.

### C. Bethel School District No. 403 v. Fraser

*Bethel School District No. 403 v. Fraser*<sup>49</sup> presented the Court with its first opportunity to apply *Tinker* to a student free speech case.<sup>50</sup> In *Fraser*, a high school student delivered a speech nominating a fellow student for student government at a school-sponsored assembly.<sup>51</sup> Students were required to attend either the assembly or a study hall.<sup>52</sup>

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45. Brandon James Hoover, *An Analysis of the Applicability of First Amendment Freedom of Speech Protections to Students in Public Schools*, 30 U. LA VERNE L. REV. 39, 62 (2008).

46. Joseph Russomanno, *Dissent Yesterday and Today: The Tinker Case and Its Legacy*, 11 COMM. L. & POL’Y 367, 375–76 (2006).

47. *Id.* at 382; see also William Galston, *When Well-Being Trumps Liberty: Political Theory, Jurisprudence, and Children’s Rights*, 79 CHI-KENT L. REV. 279, 280 (2004) (“[W]e are not free simply to balance speech, or religious free exercise, against considerations of social utility.”).

48. Colin M. Macleod, *A Liberal Theory of Freedom of Expression for Children*, 79 CHI-KENT L. REV. 55, 79 (2004).

49. 478 U.S. 675 (1986).

50. After *Tinker* was decided in 1969, the Supreme Court did not decide another student speech case until *Fraser* in 1986.

51. *Fraser*, 478 U.S. at 677.

52. *Id.*

About 600 students attended the assembly, many of whom were fourteen years old.<sup>53</sup> The speech at issue was filled with sexual innuendo.<sup>54</sup> “During Fraser’s delivery of the speech, . . . [s]ome students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in [his] speech.”<sup>55</sup> The student was suspended for violating the school’s policy prohibiting obscene language.<sup>56</sup>

The *Fraser* Court held that the school “acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.”<sup>57</sup> The Court noted that “the penalties imposed in this case were unrelated to any political viewpoint.”<sup>58</sup> Moreover,

[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.<sup>59</sup>

The Court explained “[t]he marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of respondent’s speech in this case”<sup>60</sup> and observed that it had repeatedly acknowledged the importance of protecting children from exposure to sexually explicit, indecent, vulgar, lewd, and offensive speech.<sup>61</sup> As such, “the First Amendment gives a high school student the classroom right to wear *Tinker*’s armband, but not *Cohen*’s jacket.”<sup>62</sup>

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53. *Id.*

54. For portions of the speech, see Justice Brennan’s concurring opinion. *Id.* at 687 (Brennan, J., concurring).

55. *Id.* at 678 (majority opinion).

56. *Id.*

57. *Id.* at 685.

58. *Id.*

59. *Id.*

60. *Id.* at 680.

61. *Id.* at 684; see also *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (holding that the obscene content of a radio broadcast could be regulated, due to the fact that children may be listening); *Ginsberg v. New York*, 390 U.S. 629, 638–39 (1968) (ruling that the State has the right to limit people from selling sexually explicit material to minors).

62. *Fraser*, 478 U.S. at 682 (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)). In *Cohen v. California*, 403 U.S. 15 (1971), the Court invalidated the conviction of a Vietnam War protester for breaching the peace by wearing a jacket that said “Fuck the Draft” in a courthouse corridor. *Id.* at 26.

In addition, the Court found the role of public schools as institutions that “inculcate the habits and manners of civility”<sup>63</sup> and “prohibit the use of vulgar and offensive terms in public discourse”<sup>64</sup> to be significant, noting that “[e]ven the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.”<sup>65</sup> The Court noted Congress’s longstanding practice of prohibiting the use of indecent, abusive, or offensive language during floor debates and asked, “[c]an it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?”<sup>66</sup> The Court declared that:

[t]hese fundamental values of “habits and manners of civility” essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these “fundamental values” must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students.<sup>67</sup>

The Court held that “[t]he pervasive sexual innuendo in Fraser’s speech was plainly offensive to both teachers and students—indeed to any mature person.”<sup>68</sup>

Lower courts have struggled to interpret *Fraser* in cases that do not involve sexual innuendo.<sup>69</sup> As a general matter, “*Fraser* is commonly read to treat speech that is lewd or offensive in its manner of expression as low-value speech in the schools even though such speech enjoys more protection elsewhere.”<sup>70</sup> However, a “broad reading of *Fraser* [would] allow[] a school to restrict any speech that

63. *Fraser*, 478 U.S. at 681.

64. *Id.* at 683.

65. *Id.* at 681.

66. *Id.* at 682.

67. *Id.* at 681; see also *id.* at 688 (Brennan, J., concurring) (“[T]he State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities.”).

68. *Id.* at 683 (majority opinion). In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court observed that “[t]he decision in *Fraser* rested on the ‘vulgar,’ ‘lewd,’ and ‘plainly offensive’ character of a speech delivered at an official school assembly rather than on any propensity of the speech to ‘materially disrupt[] classwork or involv[e] substantial disorder or invasion of the rights of others.’” *Id.* at 271–72 n.4 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

69. Compare *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536, 540–42 (6th Cir. 2001) (interpreting *Fraser* to apply only to lewd and indecent speech, not speech involving an objectionable viewpoint such as a Confederate flag), with *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 469 (6th Cir. 2000) (interpreting *Fraser* to apply to plainly offensive language as well as vulgar language).

70. John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223, 228 n.18 (2007).

is inconsistent with the school's educational mission or conflicts with the fundamental values of public school education."<sup>71</sup>

As one author has explained, this view undermines *Tinker* "by allowing a school to define whatever mission it sees fit and then argue that whatever speech disagrees with or undermines that mission is offensive."<sup>72</sup> To prevent *Fraser* from having the effect of eviscerating *Tinker*, the author has argued that plainly offensive speech that schools may prohibit "should include speech that may not necessarily rise to the level of obscenity or indecency, but that nonetheless 'causes a break in the learning process.' . . . [T]he school must show not only that the speech was somehow inappropriate for school but also that it caused some disruption of school functioning."<sup>73</sup> Properly interpreted, *Fraser* should have little, if any, bearing in cases involving student religious or pro-life clothing because such expression does not entail the kind of lewd or sexually explicit speech that *Fraser* allows schools to restrict.<sup>74</sup> And as explained later, the majority opinion and Justice Alito's concurring opinion in *Morse v. Frederick*<sup>75</sup> expressly rejected a broad reading of *Fraser*.<sup>76</sup>

#### D. Hazelwood School District v. Kuhlmeier

In *Hazelwood School District v. Kuhlmeier*,<sup>77</sup> the Court considered "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."<sup>78</sup> A high school principal withheld two articles for publication in the school-sponsored student newspaper.<sup>79</sup> The newspaper was written and edited by a Journalism II class, but the school maintained ultimate editorial control over its contents.<sup>80</sup> One deleted article involved three students' experiences with

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71. Sarah Tope Reise, Comment, "*Just Say No*" to Pro-Drug and Alcohol Student Speech: *The Constitutionality of School Prohibitions of Student Speech Promoting Drug and Alcohol Use*, 57 EMORY L.J. 1259, 1279 (2008).

72. *Id.* at 1289.

73. *Id.* (citations omitted).

74. See K.D. *ex rel.* Dibble v. Fillmore Cent. Sch. Dist., No. 05-CV-0336(E), 2005 WL 2175166, at \*5–7 (W.D.N.Y. Sept. 6, 2005) (explaining that a student's shirt that condemned abortion constituted protected speech because the clothing was not obscene and did not disrupt the school environment).

75. 127 S. Ct. 2618 (2007).

76. See *infra* notes 109–113 and accompanying text (noting that in *Morse* both the majority opinion and Justice Alito's concurring opinion endorse a more limited view of *Fraser*).

77. 484 U.S. 260 (1988).

78. *Id.* at 262.

79. *Id.* at 263–64.

80. *Id.* at 263.

pregnancy.<sup>81</sup> The principal believed that the references to sexual activity and birth control were inappropriate for some of the younger readers and was also concerned that the pregnant students might be identifiable from the article's text.<sup>82</sup> The other article discussed divorce's impact on students and included one student's critical remarks about her father.<sup>83</sup> The principal believed that the father mentioned in the divorce article should be able to respond but there was not sufficient time to alter the article before the newspaper was published.<sup>84</sup>

In discussing *Tinker's* application to the case at hand, the Court noted the key difference between the question considered in *Tinker* of "whether the First Amendment requires a school to tolerate particular student speech" and the question raised in the instant case of "whether the First Amendment requires a school affirmatively to promote particular student speech."<sup>85</sup> The Court observed that:

The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.<sup>86</sup>

The Court declined to apply the *Tinker* standard to the case at hand or classify the newspaper as a "public forum,"<sup>87</sup> instead holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>88</sup> The Court stated:

[A] school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched,

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 263–64.

85. *Id.* at 270.

86. *Id.* at 270–71.

87. *Id.* at 270 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

88. *Id.* at 273.

biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.<sup>89</sup>

In addition, it noted that “[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order.’”<sup>90</sup> The Court upheld the school’s exercise of editorial discretion in the case at hand, stating “we cannot reject as unreasonable Principal Reynolds’s conclusion that neither the pregnancy article nor the divorce article was suitable for publication in *Spectrum*.”<sup>91</sup>

Justice Brennan, joined by Justices Marshall and Blackmun, acknowledged in his dissenting opinion that “student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.”<sup>92</sup> However, Justice Brennan expressed his concern that affording schools unduly broad authority to censor student expression that contradicts their educational missions would have grave consequences for student speech rights. He noted that “[a] student who responds to a political science teacher’s question with the retort, ‘socialism is good,’ subverts the school’s inculcation of the message that capitalism is better.”<sup>93</sup> Furthermore, he noted that “public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.”<sup>94</sup>

*Hazelwood* has minimal relevance to the issue of expression through student clothing because no person could reasonably believe that the message a student conveys through clothing “bear[s] the imprimatur of the school.”<sup>95</sup> However, Justice Brennan’s dissenting opinion serves as a reminder that schools do not have *carte blanche* to censor student expression that presents a viewpoint that conflicts with the school’s own message.<sup>96</sup>

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89. *Id.* at 271 (citations omitted).

90. *Id.* at 272 (citation omitted).

91. *Id.* at 276.

92. *Id.* at 283 (Brennan, J., dissenting).

93. *Id.* at 279.

94. *Id.* at 280.

95. *Id.* at 271 (majority opinion); *see also id.* at 270–71 (distinguishing between student speech that is a “student’s personal expression that happens to occur on the school premises” and “school-sponsored publications, theatrical productions, and other expressive activities that . . . might reasonably [be] perceived[d] . . . as part of the school curriculum”).

96. *See id.* at 280 (Brennan, J., dissenting) (stressing that “mere incompatibility with the school’s pedagogical message” does not permit a school to restrict a student’s speech).



*E. Morse v. Frederick*

In *Morse v. Frederick*,<sup>97</sup> a high school allowed students to leave class to observe the Olympic Torch Relay as it proceeded along a street in front of the school.<sup>98</sup> The school treated the occasion as a school-sponsored event similar to a field trip and teachers monitored the students' behavior.<sup>99</sup> "As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: 'BONG HiTS 4 JESUS.'"<sup>100</sup> The principal interpreted the banner to encourage illegal drug use in violation of school policy and told the student to take it down.<sup>101</sup>

The Supreme Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it."<sup>102</sup> The Court observed that, while "[t]he message on Frederick's banner [was] cryptic," it was reasonable for the principal to conclude that it promoted illegal drug use (rather than any political or religious message).<sup>103</sup>

The Court reviewed previous cases that established that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"<sup>104</sup> and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'"<sup>105</sup> After reviewing its previous student speech cases,<sup>106</sup> the Court emphasized that "detering drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest."<sup>107</sup> The Court declared that "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."<sup>108</sup>

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97. 127 S. Ct. 2618 (2007).

98. *Id.* at 2622.

99. *Id.*

100. *Id.*

101. *Id.* at 2622–23.

102. *Id.* at 2622.

103. *Id.* at 2624–25.

104. *Id.* at 2622 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

105. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

106. *Id.* at 2625–27 (outlining the holdings of *Tinker*, *Fraser*, and *Hazelwood*).

107. *Id.* at 2628 (citation omitted).

108. *Id.* at 2629 (citations omitted).

Importantly, the Court rejected the school's expansive view of *Fraser*:

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." *After all, much political and religious speech might be perceived as offensive to some.*<sup>109</sup>

Justice Alito, joined by Justice Kennedy, wrote a concurring opinion that stated their view that the majority opinion applied to situations where student speech advocates illegal drug use.<sup>110</sup> Moreover, the majority opinion "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"<sup>111</sup>

Justice Alito pointed out that the Court rejected "the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'"<sup>112</sup> Justice Alito further observed:

The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

. . . The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.<sup>113</sup>

Justice Breyer wrote separately to express his concern that, "while the [Court's] holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions."<sup>114</sup> Justice Stevens wrote a dissenting opinion that was joined by Justices Souter and Ginsburg.<sup>115</sup> The dissent

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109. *Id.* (citation omitted) (emphasis added).

110. *Id.* at 2636 (Alito, J., concurring) (citation omitted).

111. *Id.* (citation omitted).

112. *Id.* at 2637 (citation omitted).

113. *Id.*

114. *Id.* at 2639 (Breyer, J., concurring in part and dissenting in part).

115. *Id.* at 2643 (Stevens, J., dissenting).

characterized the banner's "oblique"<sup>116</sup> drug reference as one "that was never meant to persuade anyone to do anything."<sup>117</sup> Justice Stevens declared that "the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students."<sup>118</sup> In the dissenters' view, the principal's decision to require the student to take the banner down was based on disagreement with the speaker's pro-drug viewpoint<sup>119</sup> which violated the "bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>120</sup>

Justice Stevens stated, "While I find it hard to believe the Court would support punishing Frederick for flying a 'WINE SiPS 4 JESUS' banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would."<sup>121</sup> The dissent declared that the First Amendment provides vigorous protection for unpopular viewpoints, noting that, "[i]n the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment."<sup>122</sup>

Much of the legal commentary discussing *Morse* has declared that the decision signals a continued narrowing of student speech rights. One scholar has stated that, "despite the [*Morse*] Court's apparent confidence in the limited scope of its ruling, this decision is likely to significantly increase the ability of schools to impose content-based restrictions on student speech."<sup>123</sup> Another author has highlighted the fact that "*Morse* did not foreclose the possibility that the Court's student speech cases can be read together to permit some viewpoint discrimination."<sup>124</sup> Moreover, many scholars believe that "schools and

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116. *Id.*

117. *Id.* at 2644.

118. *Id.*

119. *Id.* at 2645–46.

120. *Id.* at 2645 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

121. *Id.* at 2650.

122. *Id.* at 2651 (citations omitted).

123. Joanna Nairn, Recent Development, *Free Speech 4 Students? Morse v. Frederick and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239, 239 (2008).

124. Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 220 (2007); see also Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 862–63 (2008) ("*Morse* compounds the problem by creating a *viewpoint-based* exception, not merely a content-based one: Only speech that encourages or celebrates the use of illegal drugs is punished; speech that denigrates drug use ('BONG HITS R 4 LOSERS?') is presumably permissible."); Nairn, *supra* note 123, at 256 ("Absent the healthy fear of viewpoint discrimination

courts will have wide latitude not only in deciding how and when to apply *Frederick* to student drug-related speech, but also in deciding what other viewpoints are simply outside a student's right to freedom of expression."<sup>125</sup> For example, one scholar has noted:

Nothing in the Court's decision presents itself as a means to differentiate pro-drug speech from other unpopular speech . . . such as speech that glorifies guns, extols alcohol consumption, or encourages reckless driving. . . .

. . . [S]ome leeway may exist for lower courts to extend the ruling in *Morse* to topics of speech such as smoking, gambling, sexual activity, and teenage pregnancy—activities that are not illegal for the population as a whole, as drug use is, but that many people would view as harmful to students.<sup>126</sup>

A better view, however, is that "*Morse* appears to be a case about illegal drug use and nothing more"<sup>127</sup> and, as such, its "implications for the issue of viewpoint discrimination in general are (at least in the short term) quite limited."<sup>128</sup> In addition, the *Morse* Court rejected some of the school district's broadest arguments.<sup>129</sup> Commentators have pointed out that the *Morse* Court squarely rejected the school board's arguments that *Fraser* should be read to apply to any "offensive" speech and that schools should be able to bar expression that contradicts any "educational mission."<sup>130</sup>

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demonstrated in *Tinker*, the ruling in *Morse* could easily extend far outside the starkly pro-illegal drug messages with which the Court was concerned.").

125. *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 296, 296 (2007); see also Nairn, *supra* note 123, at 256 ("The chilling effect that this decision will have upon students is likely to be profound, as it will embolden school administrators who wish to engage in increasingly restrictive speech regulation and will encourage lower courts to be more reluctant to strike down such policies.").

126. Nairn, *supra* note 123, at 252; see also Denning & Taylor, *supra* note 124, at 865 ("[A]ll manner of speech encouraging or celebrating activities that are physically dangerous—from driving fast to having sex—is potentially the subject of a similar categorical exclusion."); *The Supreme Court, 2006 Term—Leading Cases*, *supra* note 125, at 304 (noting that Justice Alito "issued a conclusory statement: '[I]llegal drug use presents a grave and in many ways unique threat to the physical safety of students.' Perhaps; but so do gun violence, unprotected sexual intercourse, traffic accidents involving inexperienced drivers, anorexia, and obesity—to take some of the more popularly known examples" (citation omitted)).

127. Taylor, *supra* note 70, at 228 n.18.

128. *Id.* at 228.

129. See *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (refusing to endorse the school district's argument that Frederick's banner should be banned as being "plainly 'offensive'" speech because such a reading is inconsistent with the Court's precedent in *Fraser*).

130. See, e.g., Denning & Taylor, *supra* note 124, at 882; see also Stephen Kanter, *Bong Hits 4 Jesus as a Cautionary Tale of Two Cities*, 12 LEWIS & CLARK L. REV. 61, 92 (2008) (explaining that the *Morse* majority "flatly reject[ed] Dean Starr's enormously broad argument on behalf of petitioners that the Court should sanction the power of school officials to censor student speech simply because it is 'offensive.'" (citation omitted)); *id.* at 94 ("Justices Alito and Kennedy categorically rejected another broad

One commentator has stated that *Morse* does not provide a green light for schools to censor religious t-shirts, even those deemed to be “aggressive” in nature: “It would be difficult to find that the aggressive religious statements on students’ T-shirts create the same sort of actual physical danger to the overwhelming number of public school students across the country as illegal drug use does.”<sup>131</sup>

*Morse* simply established that schools need not tolerate advocacy of illegal behavior; the opinion does not allow for restriction of religious, political, or unpopular speech.<sup>132</sup> As such, *Tinker* remains the most relevant case in situations involving school censorship of religious or pro-life clothing.<sup>133</sup>

## II. LOWER COURT CASES DEALING WITH “CONTROVERSIAL” RELIGIOUS OR PRO-LIFE STUDENT SPEECH

As discussed in the previous Section, the Supreme Court’s cases dealing with student speech have established a general framework while leaving important questions unanswered. Lower courts have used different modes of analysis—and have reached different results—in applying Supreme Court precedent in cases involving student religious, or pro-life, clothing. This Section reviews several leading lower court cases and argues for expansive protection of student speech.

### A. Cases Providing Broad Protection for “Controversial” Religious or Pro-Life Student Speech

*Nixon v. Northern Local School District Board of Education*,<sup>134</sup> *K.D. ex rel. Dibble v. Fillmore Central School District*,<sup>135</sup> and *Saxe ex rel. Saxe v. State College Area School District*<sup>136</sup> provide broad protection of student speech and, in our view, present a proper reading of *Tinker* and *Fraser*.

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censorial argument advanced by counsel for the principal, the school board, and the United States. . . . [The argument] would have permitted school officials to censor student speech whenever it interfered with the school’s self-defined ‘educational mission.’” (citation omitted)).

131. Bowman, *supra* note 124, at 221.

132. See *Morse*, 127 S. Ct. at 2629 (explaining that public school districts are not permitted to proscribe speech merely because it is offensive, since protected political and religious speech could be potentially offensive).

133. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969) (describing the armbands that the students wore as a form of political expression no different than a political discussion that could not be limited unless it significantly disrupted the school’s work).

134. 383 F. Supp. 2d 965 (S.D. Ohio 2005).

135. No. 05-CV-0336(E), 2005 WL 2175166 (W.D.N.Y. Sept. 6, 2005).

136. 240 F.3d 200 (3d Cir. 2001).

### I. Nixon v. Northern Local School District Board of Education

*Nixon* involved a Christian middle school student, James Nixon, who wore a t-shirt to school that said "INTOLERANT . . . Jesus said . . . I am the way, the truth and the life. John 14:6" on the front and the following on the back: "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!"<sup>137</sup> School officials would not allow him to continue wearing the shirt, citing a policy prohibiting student attire that "disrupts the educational process" or is "suggestive, obscene, or offensive."<sup>138</sup>

The court stated that "[t]here is no evidence that James' T-shirt caused any disruption at the school. . . . He has worn other shirts to school that contain religious messages such as 'WWJD' referring to the phrase 'What Would Jesus Do?'"<sup>139</sup> The court issued an injunction forbidding school officials from preventing James from wearing his t-shirt "[a]s long as the shirt is not substantially disrupting or interfering with the school's activities and an imminent and substantial disruption is not likely to occur."<sup>140</sup>

The school argued that "James does not have a constitutional right to wear the shirt to school since its message is plainly offensive (under *Fraser*) and invades on the rights of others (under *Tinker*)."<sup>141</sup> After reviewing *Fraser*, the court concluded that "a school may prohibit vulgar, lewd, obscene and plainly offensive speech since it undermines a school's basic educational mission."<sup>142</sup>

After discussing how other courts had applied or declined to apply *Fraser* in student speech cases,<sup>143</sup> the court rejected the school's interpretation of *Fraser*, stating:

*Fraser* and its progeny of cases all deal with speech that is offensive because of the manner in which it is conveyed. Examples are speech containing vulgar language, graphic sexual innuendos, or

137. *Nixon*, 383 F. Supp. 2d at 967.

138. *Id.* at 968 (citation omitted).

139. *Id.*

140. *Id.* at 975.

141. *Id.* at 970.

142. *Id.*

143. See *id.* at 970–71 (citing *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000), which upheld a school's refusal to allow Marilyn Manson t-shirts due to the singer's support of drug use, suicide, and murder in his lyrics; *Smith ex rel. Smith v. Mount Pleasant Pub. Sch.*, 285 F. Supp. 2d 987, 997 (E.D. Mich. 2003), which upheld discipline for student commentary about a school's tardy policy that included references to sexual activity of school administrators; *Barber ex rel. Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 856 (E.D. Mich. 2003), which held that *Fraser* was inapplicable in a case involving a t-shirt displaying a photo of President George W. Bush with the phrase "International Terrorist"; and *Bragg v. Swanson*, 371 F. Supp. 2d 814, 823 (W.D.W. Va. 2005), which held that *Fraser* was inapplicable in a case involving a Confederate flag shirt).

speech that promotes suicide, drugs, alcohol, or murder. Rather than being concerned with the actual content of what is being conveyed, the *Fraser* justification for regulating speech is more concerned with the plainly offensive manner in which it is conveyed.<sup>144</sup>

In addition, the court held that “[s]peech that contains a potentially offensive political viewpoint is not included in this category of regulated expression.”<sup>145</sup> In other words, where the alleged offensive nature of expression stems from the viewpoints conveyed rather than the manner in which the expression occurs, restrictions on such expression are governed by *Tinker*, not *Fraser*.<sup>146</sup> Regarding *Tinker*’s applicability to the case at hand, the court observed that there was no history of disorder in the school, and the mere fact that Muslims, homosexuals, and those who have had abortions at the school may be offended by the shirt was insufficient to justify the school’s actions.<sup>147</sup>

In addition, the court rejected the school’s claim that the t-shirt was an “invasion on the rights of others” under *Tinker*.<sup>148</sup> The court stated that it was “not aware of a single decision that has focused on that language in *Tinker* as the sole basis for upholding a school’s regulation of student speech.”<sup>149</sup> The court concluded that “invading on the rights of other students entails invading on other students’ rights to be secure and to be let alone.”<sup>150</sup> The court stated that, “[j]ust as in *Tinker*, there is no evidence that James’ silent, passive expression of opinion interfered with the work of Sheridan Middle School or collided with the rights of other students to be let alone.”<sup>151</sup>

*Nixon*’s robust protection of controversial student speech is consistent with both *Tinker* and *Fraser*. The student’s t-shirt conveyed, in admittedly strong terms, his beliefs about Christianity, Islam, abortion, and homosexuality.<sup>152</sup> The t-shirt was likely to spark conversation or debate from time to time as other students expressed their agreement or disagreement with his religious, moral, or

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144. *Id.* at 971 (citations omitted).

145. *Id.* (citations omitted).

146. *Id.*

147. *Id.* at 973. The court continued, noting that “[i]f the mere fact that other students will likely find a message offensive justified a school’s regulation of expression, then a student’s right to freely express himself would be greatly diminished.” *Id.* at 973 n.11.

148. *Id.* at 974.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See supra* text accompanying note 137 (describing Nixon’s t-shirt).

political views.<sup>153</sup> However, nothing about the t-shirt was so inherently likely to incite substantial disruption or violence to justify the school's decision to censor it.<sup>154</sup> The appropriate response for the school would have been to ensure that students who disagreed with the t-shirt's message were permitted to express their own counter-messages. This response is consistent with the principle that "[a]chieving free expression requires an open marketplace in which citizens are susceptible to varied viewpoints" and that "schools are parts of that marketplace, with students entitled to the privileges of citizenry."<sup>155</sup>

The court in *Nixon* properly rejected the view that *Tinker* permits high schools to censor student expression due to the perceived "psychological vulnerability" of students even in the absence of substantial disruption of the school environment.<sup>156</sup> Such a broad censorship authority would be "an affront to our nation's historical commitment to a freedom of speech that absorbs the risk of provoking debate, disturbance, and personal offense."<sup>157</sup> While one author has argued that the District Court in *Nixon* "did not take affronts to identity interest seriously,"<sup>158</sup> the fact remains that *Tinker* provides robust protection for student speech that is not likely to cause substantial disruption.<sup>159</sup> A large amount of student religious, pro-life, or political speech could be interpreted as an affront to the identity of other students with different belief systems, but that is no justification for censoring student speech.<sup>160</sup> High school students—many of whom are seventeen or eighteen years old—do not have a

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153. See *Nixon*, 383 F. Supp. 2d at 973 (acknowledging that certain groups, including "Muslims, homosexuals, and those who [had] had abortions," might have been offended by the t-shirt).

154. See *id.* (finding that the "mere fact that [certain] groups . . . could find the shirt's message offensive, falls well short of the *Tinker* standard for reasonably anticipat[ing] a disruption of school activities" that would justify banning the t-shirt).

155. Russomanno, *supra* note 46, at 375–76.

156. Amanda L. Houle, Note, *From T-Shirts to Teaching: May Public Schools Constitutionally Regulate Antihomosexual Speech?*, 76 FORDHAM L. REV. 2477, 2501 (2008) (citing Richard Fossey et al., *Harper v. Poway Unified School District: Schools Can Ban Demeaning Speech Toward Vulnerable Students Without Offending the First Amendment*, 211 EDUC. L. REP. 559, 570–72 (2006)).

157. *Id.* (citing Fossey et al., *supra* note 156, at 570–71).

158. Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 368 (2007).

159. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969) (noting that the school singled out the students who opposed the Vietnam War, the Court stated that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible").

160. See *Saxe ex rel. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206–07 (3d Cir. 2001) (acknowledging that prohibiting speech simply because a listener may find it offensive is not constitutionally permissible).



“right” to be sheltered from religious, pro-life, or political expression that may offend them, just as they will not have such a right once they leave school.<sup>161</sup>

## 2. K.D. ex rel. Dibble v. Fillmore Central School District

There are few reported opinions that deal with student pro-life shirts,<sup>162</sup> and cases involving pro-life literature distribution raise different issues than pro-life clothing cases and have produced conflicting results.<sup>163</sup> In the leading case on pro-life clothing, *K.D. ex rel. Dibble v. Fillmore Central School District*,<sup>164</sup> the United States District Court for the Western District of New York upheld the First Amendment right of a high school sophomore to wear a pro-life t-shirt to school.<sup>165</sup> The front of the t-shirt stated in large capital letters: “ABORTION IS HOMICIDE,” while the back of the shirt contained several phrases: “You will not silence my message”; “You will not mock my God”; “You will stop killing my generation”; and “Rock for Life!”<sup>166</sup>

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161. See Stephen M. Feldman, *Free Expression and Education: Between Two Democracies*, 16 WM. & MARY BILL RTS. J. 999, 1015–17 (2008) (discussing the Court’s treatment of the Establishment and Free Speech Clauses and arguing that religious speech will likely be protected while more controversial speech will likely not be protected).

162. In *Heinkel ex rel. Heinkel v. School Board*, the Eleventh Circuit noted in an unpublished opinion that a middle school allowed students to wear a t-shirt that read “Day of Remembrance, 45 Million lost to abortion since 1973, Remembering in silence.” on the front and “We give a voice to those who cannot speak. We stand for those who never could. We remember the 1/3 of our generation lost.” on the back. No. 05-13813, 2006 WL 2417296, at \*1 (11th Cir. Aug. 22, 2006) (per curiam). The court held that the school’s refusal to allow a student to distribute pro-life literature to her classmates was justified by a reasonable belief that substantial disruption could occur. *Id.* at \*3–5. The court found it significant that the students in the middle school ranged from age eleven to fourteen and the school did not include abortion or birth control as part of the curriculum. *Id.* Importantly, however, the court invalidated the school’s written policy, which prohibited the distribution of all religious or political literature, stating that the ban was “a content-based restriction unsupported by a reasonable belief of the School Board that all such expression would create substantial disruption in the Lee County schools.” *Id.* at \*3.

163. Compare *M.A.L. ex rel. M.L. v. Kinsland*, 543 F.3d 841, 847–50 (6th Cir. 2008) (holding that a middle school does not have to show that unregulated literature distribution would cause substantial disruption before it may impose content-neutral time, place, and manner restrictions in a case involving pro-life literature), with *Raker v. Frederick County Pub. Sch.*, 470 F. Supp. 2d 634, 640 (W.D. Va. 2007) (holding that a high school’s policy limiting student distribution of literature was invalid because there was no evidence that substantial disruption would otherwise occur in a case involving pro-life literature).

164. No. 05-CV-0336(E), 2005 WL 2175166 (W.D.N.Y. Sept. 6, 2005).

165. See *id.* at \*6 (applying the *Tinker* standard based on the content of the t-shirt, the court determined that the school failed to show that K.D.’s t-shirt interfered with or disturbed school activities).

166. *Id.* at \*1.

The Principal told the student that the shirt violated the school's dress code because it was inappropriate and interfered with the educational process.<sup>167</sup> Three female students complained to a teacher that they were "upset" by the t-shirt.<sup>168</sup> Because the school's dress code mandated suspension for students who refused to modify attire found to be in violation of the dress code,<sup>169</sup> the student was forced to stop wearing the t-shirt out of fear of a suspension.<sup>170</sup>

In considering whether the school had violated the student's freedom of speech, the court reviewed *Tinker*, *Fraser*, and *Hazelwood*.<sup>171</sup> The court held that the student's attire "is not . . . a school-sponsored expressive activity, and thus the *Hazelwood* standard does not apply to this case."<sup>172</sup> The court also held that the school's objection to the t-shirt was based on the content of the message and, therefore, *Tinker*'s substantial disruption standard applied.<sup>173</sup> The court explained:

K.D.'s expression of his pro-life message was political speech. . . . Although defendants argue that the message is "aggressive," there is no evidence showing that K.D. did anything more than walk through the hallways and attend his classes while wearing the T-shirt. . . . Like the *Tinker* students, he merely went about his ordained rounds during the school day.<sup>174</sup>

The court further explained that the fact that students at the school may find the shirt very offensive, including students who have had an abortion, is "insufficient to satisfy the *Tinker* standard."<sup>175</sup> The court added that student complaints about the content of the t-shirt "simply do not rise to the level of a 'disruption' much less a 'material and substantial interference' with K.D.'s classes or the overall administration of the school," and also noted, "[c]ertainly students do not have the right not to be 'upset' when confronted with a viewpoint with which they disagree."<sup>176</sup> As such, the court granted the student's motion for a preliminary injunction.<sup>177</sup>

The opinion in *K.D.* stands for the proposition that censorship of a pro-life message is not justified simply because a student may find it

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167. *Id.* at \*2.

168. *Id.*

169. *Id.* at \*2 n.6.

170. *Id.* at \*2.

171. *Id.* at \*3-4.

172. *Id.* at \*4.

173. *Id.* at \*6.

174. *Id.*

175. *Id.* at \*6 n.12 (citations omitted).

176. *Id.* at \*6.

177. *Id.* at \*7.

to be “offensive,” or may be upset by it.<sup>178</sup> While the subject of abortion is certainly controversial, it is no more controversial than the Vietnam War at issue in *Tinker*, yet the Court upheld the students’ right to wear an armband in protest.<sup>179</sup> The Supreme Court has acknowledged that “[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.”<sup>180</sup> Indeed, a pro-life t-shirt is a peaceful, non-disruptive way for students to express their viewpoint on “the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.”<sup>181</sup> Those who disagree with a student’s pro-life viewpoint should be mindful of the *Barnette* Court’s statement that “freedom to differ is not limited to things that do not matter much”<sup>182</sup> and that “scrupulous protection of Constitutional freedoms of the individual” is a core aspect of our system of government.<sup>183</sup>

### 3. *Saxe ex rel. Saxe v. State College Area School District*

In *Saxe ex rel. Saxe v. State College Area School District*,<sup>184</sup> Christian students challenged a school district’s “anti-harassment” policy.<sup>185</sup> The students believed that the policy prohibited them from distributing religious literature that conveyed the belief that homosexuality is a sin.<sup>186</sup> The policy defined prohibited harassment as “verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student’s educational performance or creating an intimidating, hostile or

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178. See *id.* at \*6 (recognizing that, while a school can prohibit student speech if it interferes with the rights of other students, there is no right to be free from differing viewpoints).

179. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 n.4, 513 (1969) (observing that at the time of the armband prohibition, “debate over the Viet Nam war had become vehement in many localities” and later holding that the Constitution protects a student’s right to engage controversial issues so long as school activities are not disrupted).

180. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion).

181. See *id.*

182. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

183. *Id.* at 637.

184. 240 F.3d 200 (3d Cir. 2001).

185. *Id.* at 203–04.

186. See *id.* at 203, 206 n.6, 207 (noting that anti-discrimination laws regulate speech based on content and viewpoint and require the “most exacting First Amendment scrutiny”).

offensive environment.”<sup>187</sup> According to the policy, harassment includes “any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the [listed] characteristics.”<sup>188</sup>

Writing for the United States Court of Appeals for the Third Circuit, then-Judge (now Supreme Court Justice) Alito stated that the school’s policy was overbroad in violation of the First Amendment.<sup>189</sup> Judge Alito rejected the district court’s conclusion that the anti-harassment policy went no further than federal and state anti-harassment law.<sup>190</sup> The court observed that “there is . . . no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs.”<sup>191</sup> In addition, “[h]arassing’ or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections.”<sup>192</sup>

The court took issue with a provision of the policy that prohibited disparaging speech that was directed at a person’s values, stating:

[T]he Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about “values” may offend is not cause for its prohibition, but rather the reason for its protection: “a principal ‘function of free speech under our system of government is to invite dispute.’”<sup>193</sup>

The court declared that, “[a]s subsequent federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.”<sup>194</sup> In addition, “the

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187. *Id.* at 202.

188. *Id.* at 202–03.

189. *See id.* at 215 (reasoning that the school’s policy was overbroad because it purported to restrict any unwelcome verbal conduct and the Supreme Court has continually held that “the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it”).

190. *Id.* at 204–06.

191. *Id.* at 206.

192. *Id.* at 209.

193. *Id.* at 210 (citation omitted).

194. *Id.* at 211. The court then highlighted a variety of cases where a fear of disruption was unfounded. *See id.* at 211–12 (citing *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992), which held that the school failed to show that “SCAB” buttons worn to protest replacement teachers during a strike were “inherently disruptive” to school activities, *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 667 (S.D. Tex. 1997), where a school provided “insufficient evidence of actual disruption” in prohibiting a Catholic student from wearing a rosary because some gang members had worn rosaries as their identifying symbols,

mere desire to avoid ‘discomfort’ or ‘unpleasantness’ is not enough to justify restricting student speech under *Tinker*. However, if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster.”<sup>195</sup>

In this case, the school could not demonstrate that “the Policy’s restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students.”<sup>196</sup> While the provision prohibiting speech that would “‘substantially interfer[e] with a student’s educational performance’ may satisfy the *Tinker* standard,”<sup>197</sup> the provision prohibiting speech that “creat[es] an intimidating, hostile or offensive environment” was overly broad.<sup>198</sup> The court noted that “[t]he precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear; at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress.”<sup>199</sup> The court explained that “it is certainly not enough that the speech is merely offensive to some listener,” as “much ‘core’ political and religious speech”<sup>200</sup> falls into that category. Finally, the court stated that “[a]lthough [the school district] correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy.”<sup>201</sup>

While *Nixon, K.D.*, and *Saxe* are not the only cases that have upheld the right of students to engage in controversial religious or pro-life speech,<sup>202</sup> they illustrate a proper application of *Tinker*. In the context

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and *Clark v. Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992), which determined that a school failed to demonstrate material or substantial disruption of school functions caused by distribution of religious tracts).

195. *Saxe*, 240 F.3d at 212 (citing *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358 (10th Cir. 2000)).

196. *Id.* at 216.

197. *Id.* at 217 (alteration in original).

198. *Id.* (alteration in original).

199. *Id.* (citing *Slotterback ex rel. Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991)).

200. *Id.*

201. *Id.*

202. In *Chambers v. Babbitt*, the court upheld a high school student’s right to wear a shirt to school that said “Straight Pride” on the front and had a symbol of a man and a woman holding hands on the back. 145 F. Supp. 2d 1068, 1072–74 (D. Minn. 2001). The court rejected the school’s contention that the student’s expression could be restricted due to unrelated racial incidents and an incident of vandalism of a gay student’s car. *Id.* at 1071–72. The court declared:

of the Vietnam War, the *Tinker* Court was keenly aware of the need to protect “controversial” student expression from censorship and expressly held that a student “may express his opinions, *even on controversial subjects* like the conflict in Vietnam, if he does so without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”<sup>203</sup> *Tinker*’s protection of “controversial” expression would be rendered meaningless if school authorities could cite the mere existence of a controversy as the basis for suppressing speech.<sup>204</sup>

*B. Cases Providing Moderate or Minimal Protection for “Controversial” Religious or Pro-Life Student Speech*

While the Seventh Circuit’s decision in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District*<sup>205</sup> provides moderate protection for controversial student religious expression, the Ninth Circuit’s decision in *Harper ex rel. Harper v. Poway Unified School District*<sup>206</sup> provides schools with broad leeway to restrict student speech and poses a substantial threat to the future of student religious and pro-life expression.

*1. Nuxoll ex rel. Nuxoll v. Indian Prairie School District*

In *Nuxoll*, the Seventh Circuit upheld a high school student’s right to wear a shirt that said “Be Happy, Not Gay,” while belittling the importance of protecting student speech.<sup>207</sup> Some students at the school participated in a “Day of Silence” event that sought to promote tolerance for homosexuals by remaining silent throughout the day and wearing expressive t-shirts.<sup>208</sup> On the following day,

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Maintaining a school community of tolerance includes the tolerance of such viewpoints as expressed by “Straight Pride.” While the sentiment behind the “Straight Pride” message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own.

*Id.* at 1073.

203. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (citations omitted) (emphasis added) (alteration in original).

204. *See id.* at 512–14 (recognizing that interpersonal communication is an important part of the educational process and inferring that controversial issues further the educational process by providing a platform for students to form opinions, express those opinions, and learn to communicate with one another).

205. 523 F.3d 668 (7th Cir. 2008).

206. 445 F.3d 1166 (9th Cir. 2006), *vacating as moot*, 549 U.S. 1262 (2007).

207. *See Nuxoll*, 523 F.3d at 676 (holding that the student’s shirt could not be linked to any harassment and was highly unlikely to “poison the educational atmosphere”).

208. *Id.* at 670.

students who objected to homosexual behavior participated in a “Day of Truth” event by wearing shirts with messages such as “Day of Truth . . . The Truth cannot be silenced.”<sup>209</sup> One student’s t-shirt said, “Be Happy, Not Gay” on the back, but the school inked out the “Not Gay” language.<sup>210</sup> The school considered “Be Happy, Not Gay” to be a derogatory comment on a particular sexual orientation in violation of a school rule forbidding “derogatory comments . . . that refer to race, ethnicity, religion, gender, sexual orientation, or disability.”<sup>211</sup>

A student who wanted to wear a “Be Happy, Not Gay” shirt to school challenged the school’s policy on its face as well as its application to his particular shirt.<sup>212</sup> He argued that he had the right to wear any t-shirt that condemns homosexual behavior that does not amount to “fighting words” (for example, a shirt stating “homosexuals go to Hell” could be prohibited).<sup>213</sup> Judge Posner’s majority opinion argued for the broad authority of schools to regulate controversial student speech:

A heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense. The contribution that kids can make to the marketplace in ideas and opinions is modest and a school’s countervailing interest in protecting its students from offensive speech by their classmates is undeniable.<sup>214</sup>

The court held that the school’s policy was reasonable in light of the fact that “[p]eople are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity—none more so than a sexual orientation that deviates from the norm.”<sup>215</sup>

The court found the free speech interests at stake to be minimal, stating that “uninhibited high-school student hallway debate over sexuality—whether carried out in the form of dueling T-shirts, dueling banners, dueling pamphlets, annotated Bibles, or soapbox oratory—[is not] an essential preparation for the exercise of the franchise.”<sup>216</sup> In addition, the court stated that

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 671; *see* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting that speech can be limited when it falls within a few narrow categories, including insulting or fighting words that are reasonably likely to incite a breach of the peace).

214. *Nuxoll*, 523 F.3d at 671.

215. *Id.*

216. *Id.*

[w]e foresee a deterioration in the school's ability to educate its students if negative comments on homosexuality by students like Nuxoll who believe that the Bible is the word of God to be interpreted literally incite negative comments on the Bible by students who believe either that there is no God or that the Bible should be interpreted figuratively. Mutual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning.<sup>217</sup>

Importantly, the court rejected the school's argument based on *Tinker's* "rights of others" language, noting that "people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life."<sup>218</sup> Additionally, the court observed that "[t]here is no indication that the negative comments that the plaintiff wants to make about homosexuals or homosexuality names or otherwise targets an individual or is defamatory."<sup>219</sup> *Tinker* "was a quite different case from this" because, in the court's view, the school in *Tinker* "was discriminating against a particular point of view, namely opposition to the Vietnam war expressed by the wearing of black armbands,"<sup>220</sup> because "ban[ning] all discussion of the Vietnam war would in reality have been taking sides—would have delighted the government—because the debate over the war was started, maintained, and escalated by the war's opponents."<sup>221</sup>

The court concluded that a school is not "required to prove that unless the speech at issue is forbidden serious consequences will in fact ensue. . . . It is enough for the school to present 'facts which might reasonably lead school officials to forecast substantial disruption.'"<sup>222</sup> The court noted that "one of the concerns expressed by the Supreme Court in *Morse* was with the *psychological* effects of drugs"<sup>223</sup> and it stated: "[i]magine the psychological effects if the plaintiff wore a T-shirt on which was written 'blacks have lower IQs than whites' or 'a woman's place is in the home.'"<sup>224</sup> The court concluded that schools may regulate speech that school officials believe "will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption."<sup>225</sup>

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217. *Id.* at 672.

218. *Id.*

219. *Id.*

220. *Id.* at 673.

221. *Id.* at 675.

222. *Id.* at 673 (citation omitted).

223. *Id.* at 674 (citing *Morse v. Frederick*, 127 S. Ct. 2618, 2628–29 (2007)).

224. *Id.*

225. *Id.*



While the court noted that the school's policy would be problematic "if the school understood 'derogatory comments' to embrace *any* statement that could be construed by the very sensitive as critical of one of the protected group identities,"<sup>226</sup> the court stated that "high-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students."<sup>227</sup>

Regarding the policy's applicability to the "Be Happy, Not Gay" t-shirt, the court stated that "[o]ne cannot even be certain that it is a 'derogatory' comment; for 'not gay' is a synonym for 'straight,' yet the school has told us that it would not object to a T-shirt that said 'Be Happy, Be Straight.'"<sup>228</sup> The court declared that, while a student wearing the t-shirt "is expressing disapproval of homosexuality," its message "is only tepidly negative; 'derogatory' or 'demeaning' seems too strong a characterization."<sup>229</sup> In addition, while there had been past incidents of harassment of homosexual students at the school, "it is highly speculative that allowing the plaintiff to wear a T-shirt that says 'Be Happy, Not Gay' would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere."<sup>230</sup>

In a concurring opinion, Judge Rovner criticized the majority's dismissive attitude toward student speech:

Youth are often the vanguard of social change. Anyone who thinks otherwise has not been paying attention to the civil rights movement, the women's rights movement, the anti-war protests for Vietnam and Iraq, and the [2008] presidential primaries where the youth voice and the youth vote are having a substantial impact. And now youth are leading a broad, societal change in attitude towards homosexuals, forming alliances among lesbian, gay, bisexual, transgendered ("LGBT") and heterosexual students to discuss issues of importance related to sexual orientation. They have initiated a dialogue in which Nuxoll wishes to participate.<sup>231</sup>

Moreover, Judge Rovner observed that the young adults, whom the majority dismissed as "kids" and "children," will soon be eligible to vote, to marry and to serve in the military, among other important

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226. *Id.*

227. *Id.* at 674–75.

228. *Id.* at 675.

229. *Id.* at 676.

230. *Id.*

231. *Id.* at 677–78 (Rovner, J., concurring) (citation omitted).

rights and duties that adults hold.<sup>232</sup> Judge Rovner further stated, “I view this as a simple case,”<sup>233</sup> and explained that “[t]he school district has ‘not demonstrate[d] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.’”<sup>234</sup>

Judge Rovner disagreed with the majority’s characterization of *Tinker* as a case about viewpoint discrimination, stating that “[i]t is more appropriately characterized as a discussion about subject matter discrimination, although the opinion is not limited to the circumstance where the school has banned all discussion of a particular subject.”<sup>235</sup> While considering the language “Be Happy, Not Gay” to be “derogatory” and “disparaging,”<sup>236</sup> Judge Rovner stated that “it is not the kind of speech that would materially and substantially interfere with school activities.”<sup>237</sup> She continued, declaring that “[t]here is a significant difference between expressing one’s religiously-based disapproval of homosexuality and targeting LGBT students for harassment. Though probably offensive to most LGBT students, the former is not likely by itself to create a hostile environment.”<sup>238</sup> Judge Rovner concluded that “[t]he First Amendment as interpreted by *Tinker* is consistent with the school’s mission to teach by encouraging debate on controversial topics while also allowing the school to limit the debate when it becomes substantially disruptive. Nuxoll’s slogan-adorned t-shirt comes nowhere near that standard.”<sup>239</sup>

Judge Rovner’s concurring opinion is more consistent with *Tinker* than Judge Posner’s majority opinion. Judge Posner’s flippant statement that “[t]he contribution that kids can make to the marketplace in ideas and opinions is modest”<sup>240</sup> was effectively countered by Judge Rovner’s observation that those “kids” are already eligible, or soon will be eligible, to exercise the rights of adulthood such as the right to vote, serve in the military, or marry.<sup>241</sup> Accordingly, student religious and political expression, while often less sophisticated than that of adults, is nevertheless important in

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232. *Id.* at 677–78 (Rovner, J., concurring) (citation omitted).

233. *Id.* at 676.

234. *Id.* at 676–77 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13, 514 (1969)) (alterations in original).

235. *Id.* at 677.

236. *Id.* at 678, 679.

237. *Id.* at 679.

238. *Id.*

239. *Id.* at 680.

240. *Id.* at 671 (majority opinion).

241. *Id.* at 678 (Rovner, J., concurring).

helping students learn how to formulate and express their own opinions as well as respond to the opinions of other students with which they disagree.<sup>242</sup> As Judge Rovner correctly noted, student expression of religiously-based disapproval of homosexual behavior cannot be reflexively labeled as harassment or hate speech that schools may censor in the name of tolerance.<sup>243</sup>

## 2. Harper ex rel. Harper v. Poway Unified School District

The Ninth Circuit's decision in *Harper ex rel. Harper v. Poway Unified School District*<sup>244</sup> provides schools with broad leeway to restrict student speech and has been the subject of much criticism and debate.<sup>245</sup> *Harper* involved a school's decision to forbid a sophomore student from wearing a t-shirt that stated "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL" on the back.<sup>246</sup> He wore the shirt in response to "Day of Silence" activities at the school that promoted tolerance of students with a different sexual orientation.<sup>247</sup> One year earlier, there had been some altercations at the school during a "Day of Silence" and a subsequent "Straight-Pride Day,"<sup>248</sup> although it was unclear whether those events had any real relationship to the case at hand.<sup>249</sup>

A panel of the United States Court of Appeals for the Ninth Circuit upheld the school's decision to ban the shirt by a two-to-one vote in a broad-ranging decision that, if followed, would allow schools to censor virtually any student t-shirt that expresses opposition to homosexuality.<sup>250</sup> The majority opinion, authored by Judge Reinhardt, declared: "Perhaps our dissenting colleague believes that

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242. *But see* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (noting that although students "do not 'shed their constitutional rights . . . at the schoolhouse gate' . . . the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings'" (citations omitted)).

243. *Nuxoll*, 523 F.3d at 679 (Rovner, J., concurring) (noting that there is a difference between harassing students belonging to minority groups and expressing a religious point of view).

244. 445 F.3d 1166 (9th Cir. 2006), *vacating as moot*, 549 U.S. 1262 (2007).

245. *See id.* at 1178 (holding that schools may prohibit speech that intrudes upon the rights of other students).

246. *Id.* at 1171.

247. *Id.*

248. *Id.* at 1171–72.

249. *Id.* at 1194–95 (Kozinski, J., dissenting) (noting that the prior year's disturbance did not involve Harper and could not be clearly traced to any messages on a student's t-shirt).

250. *See id.* at 1180 (majority opinion) ("[T]he school had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn.").

one can condemn homosexuality without condemning homosexuals. If so, he is wrong. To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful.”<sup>251</sup> The majority opinion used many strong terms for its view of the t-shirt’s message such as “condemning,”<sup>252</sup> “demeaning,”<sup>253</sup> “injurious,”<sup>254</sup> a “verbal assault[],”<sup>255</sup> a “psychological attack[],”<sup>256</sup> “derogatory,”<sup>257</sup> “degrad[ing],”<sup>258</sup> “harmful,”<sup>259</sup> “hateful,”<sup>260</sup> “homophobic,”<sup>261</sup> “discriminatory,”<sup>262</sup> and “offensive.”<sup>263</sup>

The court took a broad view of *Tinker*’s statement that public schools may restrict student speech that “‘intrudes upon . . . the rights of other students’ or ‘collides with the rights of other students to be secure and to be let alone.’”<sup>264</sup> The court stated:

Harper’s wearing of his T-shirt “collides with the rights of other students” in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to “be secure and to be let alone.” Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.<sup>265</sup>

The court held that schools “may prohibit the wearing of T-shirts on high school campuses and in high school classes that flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of particularly vulnerable students [such as race, religion, and sexual orientation] and that may cause them significant injury.”<sup>266</sup> The court drew a comparison between Harper’s t-shirt and “labeling black students inferior” or “wearing T-shirts saying that Jews

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251. *Id.* at 1181.

252. *Id.*

253. *Id.* at 1175 n.11, 1177, 1178, 1182, 1187 & n.34.

254. *Id.* at 1180, 1181, 1182 & n.27, 1183, 1185, 1186, 1187 n.34, 1192.

255. *Id.* at 1178 & n.18, 1179, 1183, 1185.

256. *Id.* at 1178.

257. *Id.* at 1180, 1183.

258. *Id.* at 1181.

259. *Id.* at 1181, 1182, 1188.

260. *Id.* at 1186.

261. *Id.* at 1186 n.32.

262. *Id.* at 1188.

263. *Id.* at 1189. The court further stated “[b]ecause we decide Harper’s free speech claim on the basis of *Tinker*, we need not consider whether his speech was ‘plainly offensive’ under *Fraser*.” *Id.* at 1176 n.14.

264. *Id.* at 1177 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

265. *Id.* at 1178 (citations omitted).

266. *Id.* at 1182.

are doomed to Hell” and stated that, “[i]f a school permitted its students to wear shirts reading, ‘Negroes: Go Back To Africa,’ no one would doubt that the message would be harmful to young black students.”<sup>267</sup>

The court stated that, in pursuit of their educational mission, “public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred.”<sup>268</sup> For example, a school “need not permit its students to wear T-shirts reading, ‘Jews Are Christ-Killers’ or ‘All Muslims Are Evil Doers’” if it holds a “Day of Religious Tolerance,” nor must it allow swastikas or Confederate flags in response to a “Day of Racial Tolerance.”<sup>269</sup>

The panel tried to limit the scope of its decision, stating, “we reaffirm the importance of preserving student speech about controversial issues generally and protecting the bedrock principle that students ‘may not be confined to the expression of those sentiments that are officially approved.’”<sup>270</sup> For example, the majority stated that t-shirts that declare “Young Republicans Suck” or “Young Democrats Suck” or that “denigrate the President, his administration, or his policies, or otherwise invite political disagreement or debate, including debates over the war in Iraq, would not fall within the ‘rights of others’ *Tinker* prong.”<sup>271</sup>

Judge Kozinski’s dissenting opinion stated that “[r]econciling *Tinker* and *Fraser* is no easy task,”<sup>272</sup> but declared that “the school authorities have offered no lawful justification for banning Harper’s T-shirt.”<sup>273</sup> The dissent noted that there was scant evidence showing any actual or likely disruption caused by Harper’s t-shirt—he wore a similar shirt on the previous day and there was no disruption<sup>274</sup>—and stated that the vague references to altercations that occurred a year earlier bore little, if any, connection to the case at hand.<sup>275</sup> The dissent noted that “discussions [between high school students] can become heated, but so long as they don’t escalate into violence or the

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267. *Id.* at 1180–81.

268. *Id.* at 1185.

269. *Id.* at 1185–86 (citations omitted).

270. *Id.* at 1182 (citations omitted).

271. *Id.*

272. *Id.* at 1193 n.1 (Kozinski, J., dissenting).

273. *Id.* at 1192.

274. *Id.* at 1195–96.

275. *Id.* at 1194–95.

threat of violence, and do not otherwise interfere with school operations, they cause no disruption of the school environment.”<sup>276</sup>

In addition, the dissent took issue with the idea that a school could deem the promotion of one side of a contentious debate to be part of its educational mission and then declare student expression with an opposing viewpoint to be inconsistent with the educational process.<sup>277</sup> Moreover, the dissent acknowledged that

tolerance toward homosexuality and homosexual conduct is anathema to those who believe that intimate relations among people of the same sex are immoral or sinful. . . . [A] visible and highly publicized political action by those on one side of the issue will provoke those on the other side to express a different point of view, if only to avoid the implication that they agree.<sup>278</sup>

Regarding the “rights of others” language from *Tinker*, the dissent stated, “[s]urely, this language is not meant to give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech.”<sup>279</sup> Instead, “[t]he ‘rights of others’ language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established.”<sup>280</sup> The dissent also rejected the majority’s conclusion that “messages such as Harper’s are so offensive and demeaning that they interfere with the ability of homosexual students to partake of the educational environment.”<sup>281</sup>

The dissent questioned the scope of the majority’s unprecedented reading of the “rights of others” language, calling it a “judicial creation, hatched to deal with the situation before us, but likely to cause innumerable problems in the future.”<sup>282</sup> It stated that

if interference with the learning process is the keystone to the new right, how come it’s limited to those characteristics that are associated with minority status? Students may well have their self-esteem bruised by being demeaned for being white or Christian, or having bad acne or weight problems, or being poor or stupid or any one of the infinite number of characteristics that will not

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276. *Id.* at 1194.

277. *See id.* at 1201 (“I have considerable difficulty with giving school authorities the power to decide that only one side of a controversial topic may be discussed in the school environment because the opposing point of view is too extreme or demeaning.”).

278. *Id.* at 1196.

279. *Id.* at 1198.

280. *Id.*

281. *Id.*

282. *Id.* at 1201.

qualify them for minority status. Under the rule the majority announces today, schools would be able to ban t-shirts with pictures of Mohammed wearing a bomb turban but not those with pictures of a Crucifix dipped in urine—yet Muslim and Christian children, respectively, may have their learning equally disrupted.<sup>283</sup>

The Ninth Circuit declined to rehear the case en banc which led to three strongly-worded concurring and dissenting opinions.<sup>284</sup> Judge Reinhardt defended his panel opinion by stating, “[t]he dissenters still don’t get the message—or *Tinker*! Advising a young high school or grade school student while he is in class that he and other gays and lesbians are shameful, and that God disapproves of him, is not simply ‘unpleasant and offensive.’ It strikes at the very core of the young student’s dignity and self-worth.”<sup>285</sup> Judge Reinhardt claimed that the dissenters’ view would leave school officials powerless to prevent students from wearing t-shirts with slogans such as “Hitler Had the Right Idea . . . Let’s Finish the Job!” or “Hide Your Sisters—The Blacks Are Coming” unless and until “minority members chose to fight back physically and disrupt the school’s normal educational process.”<sup>286</sup> In a short concurring opinion, Judge Gould wrote a short concurring opinion that stated that schools may restrict “[h]ate speech, whether in the form of a burning cross, or in the form of a call for genocide, or in the form of a tee shirt misusing biblical text to hold gay students to scorn.”<sup>287</sup>

Judge O’Scannlain, joined by four other judges, dissented from the denial of rehearing en banc.<sup>288</sup> Judge O’Scannlain stated that “Judge Kozinski’s powerful dissent explains why the court errs in permitting school administrators to engage in view-point discrimination on the basis of a student’s newly promulgated right to be free from certain offensive speech.”<sup>289</sup> The dissenters observed that “Harper’s shirt was undoubtedly unpleasant and offensive to some students, but *Tinker* does not permit school administrators to ban speech on the basis of ‘a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.’”<sup>290</sup> The dissenters added that “if displaying a distasteful opinion on a T-shirt qualifies as a

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283. *Id.*

284. Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 455 F.3d 1052 (9th Cir. 2006) (denial of petition for rehearing en banc).

285. *Id.* at 1053 (Reinhardt, J., concurring).

286. *Id.*

287. *Id.* at 1053–54 (Gould, J., concurring).

288. *Id.* at 1054 (O’Scannlain, J., dissenting).

289. *Id.*

290. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

psychological or verbal assault, school administrators have virtually unfettered discretion to ban any student speech they deem offensive or intolerant.”<sup>291</sup>

In the dissenters’ view, “the panel majority’s decision amounts to approval of blatant viewpoint discrimination” because “[s]chool administrators permitted the ‘Day of Silence’ but prohibited Harper from offering a different view.”<sup>292</sup> The dissent stated that “under the panel majority’s decision, school administrators are now free to give one side of debatable public questions a free pass while muzzling voices raised in opposition.”<sup>293</sup> Judge O’Scannlain noted Eugene Volokh’s observation that the panel majority’s opinion is “a tool for suppression of one side of public debates (about same-sex marriage, about Islam, quite likely about illegal immigration, and more) while the other side remains constitutionally protected and even encouraged by the government.”<sup>294</sup>

While Harper’s claims for injunctive relief were ultimately dismissed due to mootness,<sup>295</sup> this does not negate *Harper’s* value as persuasive authority.<sup>296</sup> The Ninth Circuit’s reliance upon the “rights of others” dicta from *Tinker* has drawn heavy criticism, and one author has stated that “the Ninth Circuit became the first court in the thirty-seven years since *Tinker* to base its decision solely on the invasion of others’ rights test without applying the substantial disruption test.”<sup>297</sup> Even authors who support the outcome in *Harper* have criticized the court’s reliance upon *Tinker’s* “rights of others” dicta and have argued that the court should have used traditional

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291. *Id.*

292. *Id.*

293. *Id.* at 1055.

294. *Id.* (quoting Posting of Eugene Volokh to the Volokh Conspiracy, <http://volokh.com/posts/1145577196.shtml> (Apr. 20, 2006, 19:53)).

295. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007).

296. *See, e.g., Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 545 F. Supp. 2d 1072, 1098 n.4 (S.D. Cal. 2008) (“[A]t minimum, a vacated opinion still carries informational and perhaps even persuasive or precedential value.’ Therefore, despite its mootness, this Court may still rely upon the Ninth Circuit’s reasoning as persuasive authority.” (citation omitted)). *But see Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 179 (D. Mass. 2007) (stating that “*Harper* lacks precedential value”).

297. Douglas D. Frederick, Note, *Restricting Student Speech that Invades Others’ Rights: A Novel Interpretation of Student Speech Jurisprudence in Harper v. Poway Unified School District*, 29 U. HAW. L. REV. 479, 493 (2007); *see also* Andrew Etter, Note, *Student Speech, the Rights of Others, and a Dual-Reasonableness Standard: Zamecnik ex rel. Zamecnik v. Prairie District No. 204 Board of Education*, 2007 WL 1141597 (N.D. ILL.), 76 U. CIN. L. REV. 1343, 1348 (2008) (“Of the few courts acknowledging the ‘rights of others’ provision in *Tinker*, most have chosen not to apply it as a separate standard.”); Frederick, *supra*, at 492 (“Though the invasion of others’ rights was first mentioned in *Tinker*, this test was never applied by that Court. . . . To the contrary, this test was nothing more than dicta by the *Tinker* Court.”).



“substantial disruption” analysis.<sup>298</sup> One author supportive of the result has explained that “the Ninth Circuit created a completely new legal framework” in *Harper* which “essentially created a blank check for schools to regulate student speech, at least when that speech is anti-homosexual.”<sup>299</sup> In addition, under *Harper*,

most anti-homosexual speech in schools is subject to regulation because of its harmful psychological impact on any homosexual student attending the school. Student speech that inflicts similar psychological harm on any other individual or specific group is also potentially subject to regulation under [*Harper*’s] application of the invasion of others’ rights test.<sup>300</sup>

One scholar has posited that, using the “rights of others” test, school officials should be permitted to “restrict student speech reasonably viewed as being offensive to a reasonable student,” which would allow them to “protect[] the delicate psyche of the youth.”<sup>301</sup> The justification for this more speech-restrictive standard is that “requiring a history of disturbance before speech can be restricted provides no recourse for school administrators dealing with first-time derogatory speech that can cause immediate, and perhaps irreparable, psychological harm.”<sup>302</sup> Under this formulation, the message “Be Happy, Not Gay” is acceptable because it “cannot reasonably be viewed as injurious or derogatory to a reasonable student,”<sup>303</sup> while the message at issue in *Harper* can be prohibited because of the “overt hostility evident in the message.”<sup>304</sup> This, however, shows the inherent malleability of any standard that allows schools to censor expression due to their perceptions of the alleged psychological impact of a controversial message. Under *Harper*, virtually any message that proclaims the virtue of one religion or denounces homosexual behavior could be interpreted as a psychological attack on other students because, in Judge Reinhardt’s

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298. See, e.g., Etter, *supra* note 297, at 1357 n.144 (recognizing that “[s]ome argue that the Ninth Circuit in *Harper* reached the right outcome by allowing the school’s restriction on student speech, but that the court should have looked to the more common material and substantial disruption language of *Tinker* rather than using the rights of others provision”); Frederick, *supra* note 297, at 498 (“The majority’s decision in *Harper* was correct in its result, but its legal rationale is inconsistent with precedent.”); Mark A. Perlaky, Note, *Harper v. Poway Unified School District: The Wrong Path to the Right Outcome?*, 27 N. ILL. U. L. REV. 519, 546 (2007) (“The court reached the right outcome in *Harper v. Poway Unified School District*, but there may have been other, better ways to achieve that outcome.”).

299. Frederick, *supra* note 297, at 497.

300. *Id.* at 498.

301. Etter, *supra* note 297, at 1366.

302. *Id.* at 1363.

303. *Id.* at 1361.

304. *Id.*

view, “one can[not] condemn homosexuality without condemning homosexuals.”<sup>305</sup>

Given *Tinker*’s clear protection of controversial student speech, it is unsurprising that “some critics have called the revival of the ‘rights of others’ requirement ‘a significant restriction on the First Amendment rights . . . that were unambiguously guaranteed by *Tinker* almost forty years ago.’”<sup>306</sup> One author has noted that “*Harper* extends so far beyond *Tinker*’s limits on student free speech rights that it ultimately contradicts the authority and rationale upon which *Tinker* rests.”<sup>307</sup> “[E]ven political speech that touches on a student’s ‘core identifying characteristics such as race, religion, or sexual orientation’ should enjoy the same constitutional protection during the school day that it would in public”<sup>308</sup> because “educating high school students to exercise and endure liberty is more important to a public high school’s fundamental mission than ensuring equality or comfort.”<sup>309</sup> These commentators have properly identified the conflict between *Tinker*’s broad protection of controversial student speech and *Harper*’s authorization of censorship of student speech that may offend other students.<sup>310</sup>

It is clear that widespread adoption of *Harper*’s “rights of others” analysis would have a broad chilling effect upon student religious expression that could conceivably offend other students.<sup>311</sup> The *Harper* test “easily could prohibit religious speech from a wide variety of political, social, and religious viewpoints. . . . [D]epending on how the ‘rights of others’ concept is defined, *Tinker*’s second test could have a very broad effect.”<sup>312</sup> In addition, “restricting student speech under *Tinker*’s ill-defined second test could be notably easier for schools than restricting the same speech under the material and

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305. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1181 (9th Cir. 2006), *vacating as moot*, 549 U.S. 1262 (2007).

306. Etter, *supra* note 297, at 1359 (citation omitted).

307. Brian D. Eck, Note, *Rebel Without a Clause: The Right “Rights of Students” in Nixon v. Board of Education and the Shadow of Freedom Under Harper v. Poway*, 6 AVE MARIA L. REV. 197, 226 (2007).

308. *Id.* at 199 (citation omitted).

309. *Id.*

310. See, e.g., Eck, *supra* note 307, at 226 (comparing *Harper* to *Tinker* and arguing that *Harper* went beyond established precedent); Etter, *supra* note 297, at 1359 (discussing the critique of *Tinker*’s “rights of others” dicta that was the basis of the holding in *Harper*).

311. See *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1192 (9th Cir. 2006), *vacating as moot*, 549 U.S. 1262 (2007) (“The Free Speech Clause permits public schools to restrict student speech that intrudes upon the rights of other students. Injurious speech that may be so limited is not immune from regulation simply because it reflects the speaker’s religious views.”).

312. Bowman, *supra* note 124, at 206.

substantial disruption test, especially because religious beliefs often are central to an individual's identity and thus a particularly sensitive subject."<sup>313</sup>

One author asked, "Would a message promoting the traditional heterosexual two-parent household be as suspect as Harper's? Is it entirely irrelevant that Harper responded to school-approved messages? Do Harper's intentions matter, especially if our focus is on listener harm?"<sup>314</sup> Under *Harper*, schools could argue that censorship of speech that supports traditional marriage or heterosexual two-parent homes is justified by a concern for the psychological well-being of other students. While such expression would rarely, if ever, create a risk of substantial disruption for purposes of traditional *Tinker* analysis, *Harper* gives schools a green light to censor such expression under the guise of promoting respect for other students. This would severely hamper students' ability to express their viewpoints on controversial political, social, religious, and moral issues and, as a result, would diminish their education and their preparation to become well-informed citizens.<sup>315</sup> *Harper* squarely conflicts with *Tinker* and should be criticized or distinguished by courts considering student speech cases whenever possible.

#### CONCLUSION

Courts considering whether to follow *Harper's* lead should keep in mind Judge O'Scannlain's observation that "*Tinker* does not permit school administrators to ban speech on the basis of 'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint'"<sup>316</sup> and that, "if displaying a distasteful opinion on a T-shirt qualifies as a psychological or verbal assault, school administrators have virtually unfettered discretion to ban any student speech they deem offensive or intolerant."<sup>317</sup> Instead, "[i]n the school context, free speech rights should be as broad as possible so long as

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313. *Id.*

314. Brian J. Bilford, Note, *Harper's Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 STAN. J.C.R. & C.L. 447, 472 (2008).

315. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969) (noting that communication between students is not only an "inevitable part of the process of attending school" but "also an important part of the educational process" and as such a student "may express his opinions, even on controversial subjects . . . if he does so without 'materially and substantially interfere[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others" (citation omitted) (alteration in original)).

316. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052, 1054 (9th Cir. 2006) (denial of petition for rehearing en banc) (O'Scannlain, J., dissenting) (quoting *Tinker*, 393 U.S. at 509).

317. *Id.*

the school can still maintain discipline and its basic educational purpose.”<sup>318</sup>

The First Amendment’s broad protection of non-disruptive student speech certainly extends to “controversial” religious, pro-life, or political student expression.<sup>319</sup> As the district court observed in *Gillman ex rel. Gillman v. School Board*,<sup>320</sup>

the issue of equal rights for citizens who are homosexual is presently a topic of fervent discussion and debate within the courts, Congress, and the legislatures of the States, including Florida. The nation’s high school students, some of whom are of voting age, should not be foreclosed from that national dialogue. . . .

The robust exchange of political ideas is essential in a vibrant, progressive society and is precisely the type of speech that is sacrosanct under the First Amendment.<sup>321</sup>

When public high school administrators and teachers are confronted with “controversial” religious, pro-life, or political student expression that may contradict their viewpoints, philosophies, or educational goals, they must keep in mind that there is no legitimate educational function “that they may not perform within the limits of the Bill of Rights.”<sup>322</sup>

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318. Hoover, *supra* note 45, at 65.

319. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

320. 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

321. *Id.* at 1374–75. The *Gillman* Court struck down a high school policy that “prohibit[ed] students from wearing or displaying t-shirts, armbands, stickers, or buttons containing messages and symbols which advocate the acceptance of and fair treatment for persons who are homosexual.” *Id.* at 1361. The paraphernalia displayed slogans such as “Gay Pride” and “I Support My Gay Friends.” *Id.* at 1362.

322. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).